

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS E. DIXON,

Defendant-Appellant.

UNPUBLISHED

April 27, 2010

No. 289019

Kent Circuit Court

LC No. 08-004777-FC

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals of right his jury trial conviction on four counts of armed robbery, MCL 750.529; four counts of torture, MCL 750.85; four counts of unlawful imprisonment, MCL 750.349b; four counts of obtaining personal information with the intent to commit identity theft, MCL 445.67; first-degree home invasion, MCL 750.110a(2); and unlawfully driving away a motor vehicle, MCL 750.413. Defendant was acquitted of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's first claim on appeal is that the prosecutor violated his right of confrontation. Defendant claims that the lead detective's testimony about what a nontestifying codefendant told her was a violation of the Confrontation Clause because defendant was denied the opportunity to cross examine the codefendant about the alleged statement. While we agree with defendant that the testimony violated the Confrontation Clause, we find that reversal is not warranted because the error, while plain, did not affect defendant's substantial rights.

We review unpreserved claims of constitutional error, such as this alleged violation of the Confrontation Clause, for plain error that affected defendant's substantial rights. *People v Walker*, 273 Mich App 56, 65-66; 728 NW2d 902 (2006). Under "plain error" review, the aggrieved party must show that: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights," and a "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Defendant bears the burden of persuasion in regard to whether the error affected substantial rights, and generally must show that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763.

“The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination.” *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009). While the United States Supreme Court did not identify precisely what makes a statement testimonial, it stated that the term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In determining whether a nontestifying witness is unavailable for purposes of the Confrontation Clause, courts have used the definition of “unavailability” from MRE 804(a). *People v Garland*, 286 Mich App 1, 7; __NW2d__(2009). See also *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). MRE 804(a) defines “unavailability” as:

“Unavailability as a witness” includes situations in which the declarant–

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance...by process or other reasonable means, and in a criminal case, due diligence is shown.

A witness may also be properly found to be unavailable after pleading the Fifth Amendment. *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). The burden is on the prosecution to establish that a witness is unavailable.

The statement of the nontestifying codefendant, “Smoke,” was testimonial. The record is clear that Smoke made the statement to the detective in the course of the detective’s interrogation of him in relation to the crimes for which defendant was on trial. The statement was not made in the course of an ongoing emergency; rather, it was made to “establish or prove past events” that were relevant to both Smoke and defendant’s criminal prosecutions. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Further, there is no indication that Smoke was unavailable to testify, and there is no evidence on the record to suggest that defendant had an opportunity at an earlier trial or hearing to cross-examine Smoke. Thus, the use of the statement at trial was a violation of defendant’s Sixth Amendment right to confront witnesses against him. There was a plain error.

This plain error, however, did not affect the outcome of the trial. *Carines*, 460 Mich at 763. Smoke’s statement was that he, not defendant, asked two of the victims for a cigarette

lighter. The victim who identified defendant offered the same testimony at trial. That same victim identified defendant as the assailant with whom he fought over a shotgun, and who eventually hit him over the head with that shotgun. Because Smoke's statement was cumulative evidence and because the evidence that was presented at trial was strong evidence of defendant's guilt, we conclude that the Confrontation Clause error did not affect the outcome of defendant's trial. The error does not warrant reversal.

Defendant next claims that he was denied a fair trial by several instances of prosecutorial misconduct. Defendant failed to object to any of the alleged prosecutorial misconduct, and our review is limited to plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Defendant first claims that the prosecutor's use of Smoke's statement, and then his comment about the statement in closing argument, denied defendant a fair trial. We disagree. While we agree that the use of the statement was a Confrontation Clause violation, under plain error review, the violation is no more prejudicial to defendant when phrased as prosecutorial misconduct than it is when phrased as a constitutional violation. Moreover, the prosecutor did not knowingly elicit the testimony and because the challenged statement was cumulative, there was no prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1998). Further, a curative instruction striking the testimony would have cured any prejudice, and reversal is therefore not required. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The admission statement, and the prosecutor's attendant comment about the statement in closing argument, did not affect the outcome of trial or result in the conviction of an innocent man or affect the fairness, integrity, or public reputation of defendant's trial. *Carines*, 460 Mich at 763.

Defendant next alleges that he was denied a fair trial when the prosecutor questioned him on cross-examination about the veracity of seven witnesses. It is "improper for the prosecutor to ask defendant to comment on the credibility of prosecution witnesses. Defendant's opinion of their credibility is not probative of the matter." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The questioning of defendant about the veracity of the witnesses was plain error and amounts to misconduct, *id.* However, because the evidence of defendant's guilt was overwhelming without this improper line of questioning, we find that the error did not affect defendant's substantial rights because, on the record, it did not affect the outcome of trial. *Carines*, 460 Mich at 763.

Defendant next alleges that he was denied a fair trial when the prosecutor vouched for the credibility of the lead detective through its questioning of her during the prosecutor's rebuttal. During defendant's direct examination, defendant testified that he told the detective that one of his codefendants threatened him at the Kent County jail, even though the detective testified that he had not told her that. Defendant testified that he told the detective the truth, but that the detective did not record the conversation and did not listen to him. He testified that when he told the story, she said, "oh no, that didn't happen," and that she "already had it set in her mind from previous days that — she was prejudiced, basically, is what I'm sayin.'" He continued: "She want to get the information out of me what she wanted, but when I told her what happened to me and what was goin' on with the situation, she never responded to it. She never took action to write it down."

The prosecutor's alleged improper questioning of the detective occurred during the prosecutor's rebuttal case:

Q. Let me ask you, Detective Morningstar, have you ever been accused of lying in a police report?

A. I have not.

Q. Have you ever been suspended for lying in a police report?

A. I have not.

Q. What would happen to you if you left what would be a significant portion or an important piece of information out of a police report?

A. I would get fired.

Q. And you're here under oath testifying that on this occasion, on April 24th, the defendant never told you anything related to the story he told today in court.

A. He never told me anything about anything that he has said today.

Q. And if he had, would you have put it in your report?

A. With no doubt, it would definitely have been in my report.

A prosecutor may not vouch for the credibility of his witness by stating or implying that he has some special knowledge, not known by the jury, of the witness's truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). There is nothing on the record to indicate that the prosecutor stated or implied that he had special knowledge of the detective's credibility. Further, under the doctrine of fair response, "there is no error because a party is entitled to fairly respond to issues raised by the other party." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). The line of questioning responded to defendant's repeated assertions on his direct examination that the detective failed to include the information that he testified about in her police report. There was no error.

Defendant's last claim of prosecutorial misconduct is that the prosecutor elicited evidence of defendant's bad character trait for criminality. The prosecutor questioned the lead detective about creating a photographic lineup. The detective responded to the prosecutor's question and then added the now challenged statement.

Q. Is this part of the standard practice when you don't have the defendants called to the scene, you create a photo lineup?

A. I did. This was kind of difficult. As soon as I found out Darius' name, I could not find him. He did not have a Michigan driver's license. He had not been arrested in Michigan, so I found out he had been arrested in Illinois and he

had an Illinois state ID, so I actually had to contact Illinois and have them send me a picture of his ID.

The prosecutor did not elicit testimony about defendant's character. The prosecutor asked the detective about a photographic lineup, and her answer included a reference to the fact that defendant had been arrested in Illinois. While the police have a special obligation not to venture into forbidden areas that may prejudice the defense, *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978), reversal is not automatically required "where such a comment is not 'a studied attempt by the prosecution to place [the] matter before the jury,'" *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996), quoting *People v Sain*, 407 Mich 412, 415; 285 NW2d 772 (1979). In ruling, we note that there was no mention of what defendant was arrested for, when he was arrested, or whether he was convicted. Reversal is not required.

Defendant's final issue on appeal is that he was denied the effective assistance of trial counsel because his trial counsel failed to object to the Confrontation Clause violation and all the instances of prosecutorial misconduct. Defendant failed to move for a new trial on the grounds of ineffective assistance of counsel and failed to move for an evidentiary hearing on the issue, so his claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court's review is limited to mistakes that are apparent on the lower court record when no *Ginther*¹ hearing was held. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

"[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show prejudice, "a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Pickens*, 446 Mich at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984). Effective assistance is presumed, and defendant must overcome a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009).

Defendant first claims that defense counsel was ineffective for failing to object to the Confrontation Clause violation. However, defendant has not overcome the "heavy burden" of rebutting the presumption of effective assistance of counsel. *Seals*, 285 Mich App at 16. The failure to object to the statement that Smoke made to the detective was sound trial strategy. It was a reasonable strategy for defense counsel to not draw additional attention to the statement by placing an objection on the record. *Unger*, 278 Mich App at 242. Also, while defendant alleges that defense counsel should also have moved for a mistrial, "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Smoke's

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

statement did not present anything to the jury that the jury had not heard from the victim; thus, a mistrial was not warranted. Counsel is not ineffective for failing to make a meritless motion. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 543; 775 NW2d 857 (2009).

Defendant next claims that defense counsel was ineffective for failing to object to all of the alleged instances of prosecutorial misconduct. We disagree. Defendant's claim in regard to the Confrontation Clause violation is without merit because defendant cannot demonstrate that, but for counsel's strategic failure to object, the outcome of trial would have been different. *Pickens*, 446 Mich at 314. In regard to the alleged vouching for the credibility of the detective and the improper character reference, this claim is also without merit. The prosecutor's actions were not improper in either regard, and an objection by defense counsel would have been futile. Defense counsel is not ineffective for failing to raise a futile objection. *Mesik (On Reconsideration)*, 285 Mich App at 543.

The final claim of ineffective assistance is based on defense counsel's failure to challenge the prosecutor's repeated questioning of defendant about the veracity of the other witnesses. While the decision not to object can be sound trial strategy, *Unger*, 278 Mich App at 242, defense counsel's repeated failure to object to the line of questioning about the veracity of the witnesses was not sound strategy. Defense counsel's conduct fell below the objective standard of reasonableness. *Pickens*, 446 Mich at 303. However, defendant has not met his burden of showing that but for defense counsel's errors, the outcome of the trial would have been different. *Id.* Rather, the evidence of defendant's guilt was overwhelming, and a proper objection to the improper questioning would not have changed the outcome of the trial.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell